

No. 15-72894 (L), 15-73101

**In the United States Court of Appeals
for the Ninth Circuit**

15-72894 (L)

THE BOEING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

15-73101

NATIONAL LABOR RELATIONS BOARD,
Cross-Petitioner,

v.

THE BOEING COMPANY,
Cross-Respondent.

ON PETITION FOR REVIEW FROM DECISION OF THE
NATIONAL LABOR RELATIONS BOARD, NLRB No. 19-CA-089374

REPLY BRIEF OF PETITIONER THE BOEING COMPANY

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INTRODUCTION

Confidentiality in the reporting and investigation of workplace complaints is commonplace, and the need for it is widely recognized. Boeing's interest is to support the bringing of complaints and participation in investigations, to protect employees from retaliation and unfounded rumors, and to ensure the integrity of investigations. When considering its policy in 2012, Boeing was aware of the Board's then-recent precedent that forbade blanket requirements of confidentiality. Boeing attempted to comply and revised its notice to merely *recommend* confidentiality. The Board now tells this Court that Boeing engaged in "a transparent end run around well-established Board law." Resp. Br. 31. The Board's overcooked rhetoric is not a substitute for sensible analysis. Boeing crafted a policy that any reasonable person would understand as encouraging confidentiality for sound, employee-protective reasons. This Court should reject the Board's revisionist history and grant the petition for review for the following reasons.

First, the Board improperly tries to bolster its position by casting Boeing in a false light. The Board belabors Boeing's old notice as if it were still an issue in this case. Resp. Br. 8, 18-20, 50 n.27. The truth is that Boeing re-wrote that form shortly after the Board decided *Banner Health Sys.*, 358 N.L.R.B. 809 (2012), *vacated and remanded*, Nos. 12-1359, 12-1377 (D.C. Cir. Aug. 1, 2014). The old notice has had no application or effect for years, and it is irrelevant to the central is-

sue in this case, which is whether the *revised* notice is unlawful. The Board also weaves a false narrative in saying that Boeing violated “well-established” precedent that has been met with “judicial approval.” Resp. Br. 16, 22, 31. In fact, the Board’s *Banner Health* doctrine is novel, pending judicial review, and is controversial because it discounts the importance of confidentiality.

Second, the Board’s attack on Boeing’s revised notice distorts the key text, the notice as a whole, and the Board’s own precedent. The word “recommend” is a familiar English word, and the Board has no unique knowledge of plain English. Once it has read the notice, this Court will have as much evidence as the Board had as to how a reasonable employee would interpret it. Boeing does not believe that its employees would read the notice as a “muzzle” (Resp. Br. 10), and certainly not as to discussing *terms and conditions of employment* (as opposed to gossip), which is the critical issue. To argue otherwise, the Board warps its own precedent involving employees discussing compensation, a topic at the center of Section 7.

Third, legitimate business and free speech interests weigh against the Board’s reasoning, as the Board itself has acknowledged. If the revised notice is not misconstrued as a blanket prohibition, those interests should be decisive. There are clear, acknowledged reasons for recommending confidentiality, which is why Boeing stands by its revised notice.

Finally, the Board still offers no reasonable basis for nationwide posting.

ARGUMENT

I. The Board presents a false narrative of this case and the Board's own precedent.

This case is about attempted compliance with a significant, controversial change in Board law. The Board tries to obscure that reality by portraying Boeing as a stubborn, ill-intentioned company seeking to shackle its employees and circumvent widely accepted Board precedent. This Court should reject the Board's revisionist history.

A. The Board belabors Boeing's old notice to cast a false light on the Company.

The Board suggests repeatedly that Boeing's old notice is material, and perhaps even still requires invalidation. Resp. Br. 8, 18-20, 50 n.27. For example, the Board tells this Court that "summary enforcement" is required to direct Boeing to "cease and desist from maintaining the original notice." *Id.* at 18, 20. But the uncontested record in this case shows that the Board's depiction is not accurate. Boeing stopped using the old notice years ago on its own, and the old notice is irrelevant. The Board's extended treatment of the old notice is pure misdirection.

In July 2012, Boeing's HR Department investigated whether employee Joanna Gamble had violated Boeing's old policy *directing* employees not to discuss HR investigations. E.R. 11. On August 9, 2012, Boeing's HR Department issued a written warning to Ms. Gamble for her breach of confidentiality. *Id.*

Meanwhile, on July 30, 2012, in a case involving an HR representative who told employees not to discuss investigations, the Board announced that in its view “a rule prohibiting employees from discussing ongoing investigations of employee misconduct” violated the NLRA when an employer justified the rule with only a “generalized concern with protecting the integrity of its investigations.” *Banner Health Sys. (Banner Health I)*, 358 N.L.R.B. 809, 810 (2012), *vacated and remanded*, Nos. 12-1359, 12-1377 (D.C. Cir. Aug. 1, 2014).

In September 2012, when Boeing’s Law Department became aware of Ms. Gamble’s case, Boeing immediately rescinded the written warning based on *Banner Health I*. E.R. 22. In a letter to Ms. Gamble, Boeing explained that the Board had recently “ruled that an employer cannot prohibit employees from discussing on-going employer investigations other than in specific, individualized circumstances,” and that Boeing was “unaware of this ruling at the time of your Corrective Action.” *Id.* at 11; S.E.R. 34. For that reason, Boeing informed Ms. Gamble that it had “rescinded this corrective action from your record.” E.R. 11; S.E.R. 34.

The Board acknowledges those events (Resp. Br. 6-7 & 7 n.2), but then goes on to present matters as if the old notice were still at issue (*id.* at 8-9, 18-20, 50 n.27). The Board even suggests toward the end of its brief that Boeing has not actually rescinded Ms. Gamble’s discipline: “The Board . . . expresses no opinion as to whether Boeing has complied with paragraph 2(b), which requires it to rescind

Ms. Gamble’s written warning and ‘advise her in writing that this has been done and that the warning will not be used against her in any way.’” *Id.* at 50 n.27 (citation omitted). But the undisputed record is that Boeing has not used the old notice for *four years* (E.R. 18), that Boeing rescinded its written warning to Ms. Gamble on its own initiative before the Board was even involved in this case (*id.* at 22), and that Boeing informed Ms. Gamble of the rescission in writing, explaining that the discipline had already been removed from her record (*id.*; S.E.R. 34).

The Board also casts a false light on Boeing’s revised notice. After rescinding Ms. Gamble’s written warning, Boeing revised its confidentiality policy in November 2012 to make sure it did not prohibit employee discussions. E.R. 25; Pet. Br. 4. The revised notice only recommends confidentiality and explains why. The Board says that Boeing’s revision of the notice was “a transparent end run around well-established Board law.” Resp. Br. 31. Nothing in the record supports that characterization. It ascribes motives to people the Board does not know and did not hear from. The revised notice was, in fact, a good faith attempt at compliance and furtherance of employee-protective policies that Boeing believes in, which is why Boeing has petitioned for review.

B. The Board’s reasoning is not “well-established” and does not have “judicial approval.”

The Board claims that Boeing violated “well-established Board law” and that the Board has “consistently” applied the principles at issue with “judicial ap-

proval.” Resp. Br. 16, 31. In fact, the Board’s novel doctrine requiring employers to provide an upfront, case-by-case justification when mandating confidentiality in HR investigations was new and untested when this case was filed, there has yet to be “judicial approval” of that approach, and the D.C. Circuit has pointedly declined to endorse it. And there is no precedent regarding *recommending* confidentiality in HR investigations. Again, the Board attempts to cast Boeing in a false light as defying purportedly “well established” rules.

The Board’s insistence on case-by-case justifications for requiring confidentiality started with the Board’s summary affirmance of an ALJ decision in 2011. *Hyundai Am. Shipping Agency, Inc. (Hyundai I)*, 357 N.L.R.B. 860 (2011), *enforced in part and rev’d in part*, 805 F.3d 309 (D.C. Cir. 2015). *Hyundai* involved an oral rule—and at least an implicit threat of discipline—prohibiting employees from discussing matters under investigation, and the employee in question had been fired (though there were many reasons for that). *Id.* at 873-74. The ALJ fashioned a new requirement of case-by-case justification after summarizing two prior Board decisions. One case involved a casino that fired two employees who violated confidentiality during a drug investigation. The Board found the employer’s actions justified. *See Caesar’s Palace*, 336 N.L.R.B. 271 (2001). The other involved the firing of an employee (and union officer) who wrote an article about the handling of a sexual harassment investigation that had been closed nearly two years

earlier. The Board found continuation of a confidentiality requirement nearly two years after the matter ended, as well as the firing of the employee, unjustified. *Phoenix Transit Sys.*, 337 N.L.R.B. 510 (2002). Extrapolating from those two examples, the ALJ divined that confidentiality in a given case could only be justified if “witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a cover up.” *Hyundai I*, 357 N.L.R.B. at 874.

On review in 2015, the D.C. Circuit declined to approve the ALJ’s test for justifying confidentiality. *Hyundai Am. Shipping Agency, Inc. v. NLRB (Hyundai II)*, 805 F.3d 309, 314 (D.C. Cir. 2015) (“[W]e need not and do not endorse the ALJ’s novel view[.]”). The D.C. Circuit affirmed the Board’s ruling because Hyundai required confidentiality in all investigations, including ones “unlikely” to present the concerns Hyundai cited in support of confidentiality. *Id.*

In July 2012, citing *Hyundai I* as support, the Board for the first time offered its own explanation of a requirement of case-by-case justification of confidentiality in employee investigations. *Banner Health I*, 358 N.L.R.B. at 810. *Banner Health I* was vacated and remanded based on the Supreme Court’s decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). The Board then modified and re-issued its earlier decision in *Banner Health Sys. (Banner Health II)*, 362 NLRB No. 137 (June

26, 2015), which is still pending judicial review. *Banner Health Sys. v. NLRB*, No. 15-1245 (D.C. Cir. filed July 30, 2015).

In *Banner Health II*, the Board attempted to retroactively bolster the purported well-established-ness of the Board's policy choice. According to the Board: "The standard applied in *Hyundai* plainly derives from, and is fully consistent with, *Caesar's Palace* and *Phoenix Transit Systems*. . . . [B]oth cases demonstrate that . . . the employer must proceed on a case-by-case basis. The employer cannot reflexively impose confidentiality requirements in all cases or in all cases of a particular type." *Banner Health II*, slip op. at 3 (footnote omitted).

The Board now bristles at the D.C. Circuit's conspicuous non-endorsement of the ALJ's reasoning in *Hyundai*, attempts to downplay it, and claims it was only about the specific circumstances the ALJ mentioned. Resp. Br. 17 n.5. (The Board does not actually know that; only the D.C. Circuit would.) The Board also elides the significant change it made clear in *Banner Health II*. For the first time, the Board foreclosed confidentiality rules for "all cases of a particular type" and required case-by-case justification. *Banner Health II*, slip op. at 3. Before that in *Caesar's Palace* and *Phoenix Transit Systems*, the Board simply considered the business reasons offered by the employers in those cases and ruled accordingly. 336 N.L.R.B. at 272; 337 N.L.R.B. at 510. With *Banner Health II*, the Board mandated that there be a justification related to protecting the integrity of the investiga-

tion in each case at the outset of an investigation or the imposition of confidentiality (or a mandatory confidentiality policy) would be unlawful. The important point is that the Board should not be telling this Court that *Hyundai* or *Banner Health* or their reasoning has met with “judicial approval” (Resp. Br. 16), much less that Boeing was seeking an “end-run” around “well-established” precedent (*id.* at 31). There is no long line of judicially approved law supporting the Board’s action here.

Nor can the Board point to any authority from this Court or any other Circuit endorsing the Board’s position that (1) an employer policy that *recommends* confidentiality during HR investigations is tantamount to a blanket prohibition of employee discussion of the terms and conditions of their employment; (2) an employer policy that *recommends* confidentiality during HR investigations still requires an upfront, case-by-case business justification by the employer; and (3) the Board need not cite any record evidence of how employees interpreted a *recommendation* not to discuss an HR investigation in order to conclude that reasonable employees would feel chilled in exercising their Section 7 rights to discuss the terms and conditions of their employment.

The Court should interpret Boeing’s policy as it is and not in the false light the Board attempts to cast upon it. Boeing attempted to comply with a brand new Board decision in 2012, thought that it had, and still thinks so, which is why it filed a petition for review.

II. The Board’s interpretation of Boeing’s revised notice distorts the key words, the notice as a whole, and Board precedent to force the revised notice into the Board’s false narrative.

The Board’s assessment of Boeing’s revised notice did not rest upon any actual evidence of how employees interpret it, and no one has ever been disciplined for violating it. The Board’s reasoning rests entirely upon its own reading of the notice, its purported application of inapt precedent, and conclusory speculation about what a reasonable employee would think. Most of the Board’s argument to this Court is rhetorical *ad hominem*.

Instead of citing evidence of how employees interpret the notice (there is none to cite) or comparing similar facts from comparable cases (the Board cites no comparable cases), the Board feigns shock that Boeing believes its employees would apply the normal understanding of “recommend” and not feel prohibited from discussing the terms and conditions of their employment. The Board says that Boeing is “incredibly naïve or disingenuous” and “surprisingly detached from reality” to believe a reasonable employee would understand plain English. Resp. Br. 24, 26. That is not evidence, and it is not reasoned analysis. As to the text, the notice as a whole, and the Board’s own precedent, the Board’s arguments fail.

A. “Recommend” does not mean “require.”

As to the word “recommend” in isolation, the Board concedes that to “recommend” something does not make it “mandatory,” is not an “imperative” state-

ment, and is “precatory language,” i.e., of the nature of an entreaty. Resp. Br. 23. On the other hand, the Board argues that even when language is not “mandatory,” or a sentence is not “imperative,” or the language used is an entreaty to do something as opposed to a command, the language can still have a “coercive tendency” because of context and other factors. *Id.* But as to the threshold question of the *usual* meaning of “recommend,” the parties appear to agree that the word does not mean “require” or any other type of command.

The Board insists, though, that as used here, “recommend” *does* mean “require.” To make that leap, the Board begins with Boeing’s old notice and the observation that Boeing’s revised notice contains “minimal wording changes” compared to the old form. Resp. Br. 10, 22. Of course, the *number* of changed words is a poor measure of a change in meaning; it depends on what words were changed and what the new words are. If Boeing had inserted the word “not” before “directed,” that also would have been a “minimal wording change.” Nor do any similarities with the old notice bear on how an employee would interpret the revised notice, which stands alone and does not contain any reference to its predecessor. The old notice’s terms are, in short, irrelevant to whether the revised notice unlawfully interferes with employees’ Section 7 rights. And even if they could compare the revised notice with one discontinued *four years ago*, there is no basis for con-

cluding that reasonable employees would not recognize the difference between Boeing's "directing" something and Boeing's "recommending" something.

The Board next asserts that the word "recommend" is "not materially different from other terms, like 'ask,' 'shouldn't,' or 'request,'" and that the Board has found those terms unlawfully coercive in other contexts involving compensation. Resp. Br. 23. The Board's purported application of its own precedent is discussed below. *See* Section II.C. In isolation, though, none of those words presents an actual prohibition or command, and determining any tendency to coerce would require evaluation of the context and whether there is evidence of coercion. But the Board then speaks for all circumstances and speculates that, because of "the economic dependence inherent in employment relationships," Boeing's employees "would not reasonably construe a recommendation by their employer simply as a benign suggestion they are free to disregard." *Id.* at 24-25. Nothing in the notice or the record supports that conjecture.

The Board's "economic dependence" argument essentially says that in the employment context "recommend" always means "require." That pseudosyllogism fails. Employers routinely "recommend" exercise, healthy eating, giving up smoking, getting a good night's sleep, recycling, carpooling and riding the bus, saving for retirement and maximizing 401(k) contributions, keeping one's work area organized, and many other things, and it is unreasonable to think employees view

any of those “recommendations” as required because of “economic dependence.” The word “recommend” in isolation—even with whatever linguistic weight comes with the “obvious principle” of “economic dependence” (Resp. Br. 24)—simply cannot always mean a command to employees.

B. The notice as a whole reinforces that confidentiality is recommended to prevent harming employees or the investigation, not to prohibit discussing terms and conditions of employment.

The Board argues that the revised notice as a whole coerces employees to maintain confidentiality because it communicates that Boeing views confidentiality as “important” during workplace investigations. Resp. Br. 25-29. From that, the Board makes the leap that Boeing is “convey[ing] a strong sense that Boeing would not look favorably upon those who failed, or worse, chose not to maintain confidentiality.” *Id.* at 25. The Board cites no evidence that any employee has actually detected that “strong sense,” and the Board fails to cite precisely what in the notice conveys an implicit threat to those who do not keep confidentiality.

The Board asserts that “there is nothing in the notice to even remotely suggest that employees are free to disregard Boeing’s appeal [for confidentiality].” *Id.* at 25-26. That argument assumes what it seeks to prove, namely, that the words actually used in the notice would reasonably be viewed as coercive. The absence of a boilerplate disclaimer does not transform a permissive request into a mandatory prohibition. Moreover, the Board’s complaint that nothing in the notice tells em-

employees they can exercise their rights ignores the fact that the notice says employees can discuss investigations with their union representatives. E.R. 25; Pet. Br. 4.

The Board says the inclusion of a signature line at the end of the revised notice form is inherently coercive and “negates any advisory connotation [Boeing’s] ‘recommendation’ may have had.” Resp. Br. 25. That surmise overlooks the primary reason notice forms routinely include signature lines, which is to show that the employee received it. In this case, the signature line helps Boeing document and ensure that witnesses received the revised notice, know that Boeing will not tolerate retaliation, and were advised of and understood their rights, including the unqualified right to talk to their union representative. E.R. 25; Pet. Br. 4.

There is nothing objectively coercive about asking employees to acknowledge that they have “read and understand” the revised notice. E.R. 25; Pet. Br. 4. The Board says that Boeing requires its employees “to sign a notice promising not to discuss the case with coworkers.” Resp. Br. 40. There is no such promise. Once again, the Board ignores the actual text (and in this case misrepresents it) to advance its unreasonable theory.

The Board also conspicuously ignores the revised notice’s prohibition against retaliation. In contrast with the confidentiality terms, the retaliation rule is not a “recommendation”—it is an express prohibition:

The company prohibits retaliation against any individual who makes a complaint or participates in an investiga-

tion. If you believe that you or another individual has been subjected to retaliation because you have filed a complaint or participated in an investigation, immediately contact the HR representative at _____.

E.R. 25; Pet. Br. 4. The stark contrast between the language of the fourth paragraph and the first paragraph confirms that the two provisions operate very differently, and that confidentiality is only a recommendation and *not* a rule. Boeing recommends confidentiality and prohibits retaliation to protect its employees and encourage participation in workplace investigations, not to chill protected speech. The only prohibition is against retaliation, not against workplace discussions, and any reasonable employee would recognize the difference in how those two topics are discussed in the revised notice. The Board has no basis to suggest otherwise.

Lacking textual or evidentiary support for its claim, the Board relies on hyperbole, such as when it says Boeing's revised notice would "silence sexual harassment witnesses and victims." Resp. Br. 40. Assumption and speculation are not sufficient to support the Board's interpretation of Boeing's revised policy. *See, e.g., Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19, 29 (D.C. Cir. 2001); *Aroostook Cty. Reg'l Ophthalmology Ctr. v. NLRB*, 81 F.3d 209, 213 (D.C. Cir. 1996).

The Board cites *Cintas Corp. v. NLRB*, 482 F.3d 463 (D.C. Cir. 2007), for the proposition that no evidence of employee coercion is necessary so long as the Board's "textual analysis is reasonably defensible." *Id.* at 467; *see* Resp. Br. 21.

But the Board's textual analysis of Boeing's revised policy is clearly not reasonably defensible, so it can only be upheld if there is factual evidence to back it up.

The unlawful employer rule in *Cintas* provides an appropriate foil to Boeing's revised notice. The D.C. Circuit considered a discipline policy in an employee handbook that warned employees they "may be sanctioned" for the "unauthorized release" of "confidential information," which the same handbook defined as "any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters." *Cintas*, 482 F.3d at 465. The Board concluded that this language was an "unqualified prohibition of the release of 'any information' regarding 'its partners[,] [which] could reasonably [sic] construed by employee to restrict discussion of wages and other terms and conditions of employment with fellow employees and with the Union." *Id.* at 466 (brackets in original). That the rule stated an "unqualified prohibition" was beyond dispute, and even the employer conceded that the phrase "any information concerning . . . its partners" was "all encompassing." *Id.* at 468.

Boeing's revised notice has little in common with the rule considered in *Cintas*: (1) it contains only a recommendation, not a ban or prohibition on employee speech; (2) there is no threat of repercussions; (3) it is limited to confidential information in HR investigations, not "any information concerning the company" or its employees; (4); it is not circulated to all employees, but only to witnesses and

complainants in HR investigations; and (5) it is supported by widely recognized and substantial business justifications, which are referenced in the notice itself. *Cintas* was a straightforward case because the confidentiality rule was so overbroad and the threatened discipline so express.

Because the Board's speculation about how Boeing's employees would interpret the revised notice is not reasonable, the Board must provide factual evidence to support its position. Here, the Board insinuates without evidence a hidden agenda to "muzzle" Boeing employees. Resp. Br. 10. Nor is Boeing's motive relevant here, as the Board has not alleged or found that Boeing adopted the revised policy in response to Section 7 activity. *See Hyundai II*, 805 F.3d at 313-14.

C. The Board's decisions in *Heck's* and *Radisson Plaza* do not support the reasoning or result here.

The Board attempts to bolster its textual argument by asserting that it has previously ruled that use of words like "ask" and "request" coerces employees from exercising their Section 7 rights. Resp. Br. 23 (discussing *Heck's, Inc.*, 293 N.L.R.B. 1111 (1989) and *Radisson Plaza Minneapolis*, 307 N.L.R.B. 94 (1992), *enforced*, 987 F.2d 1376 (8th Cir. 1993)). That is not what occurred in those cases, which concerned employer rules that are not analogous to Boeing's revised notice.

As Boeing has explained (Pet. Br. 23-26), the employer communications in those cases included more than mere use of "ask" or "request," and both cases were about topics at the heart of Section 7—discussion of salaries and wages. In its

opening brief, Boeing argued that the language in *Heck's*—“your company requests [that] you regard your wage as confidential and do not discuss your salary” (293 N.L.R.B. at 1114)—tells employees that they are not to discuss their salary. *See* Pet. Br. 24. According to the Board, the key thing about *Heck's* is that the “request” was treated as a direction, and the mandatory “do not discuss” language was “irrelevant.” Resp. Br. 29. Under the Board’s theory, the “do not discuss your salary” directive in *Heck's* “is clearly a dependent clause, which is subordinate to, and qualified by, the operative verb ‘requests,’” and Boeing “blatantly misrepresents” *Heck's* in saying otherwise. *Id.* at 29 n.15.

That is nonsense (even for a footnote) and reflects the Board’s revisionist treatment of its precedent. If a “request” is followed by an imperative statement (“do not discuss your salary”), the imperative statement colors the use of the word “request.” To most readers, the imperative statement completely overshadows the word “request” because it is an obvious command. The most important text in *Heck's* is not “request,” but the phrase, “do not discuss your salary.” And, for what it is worth, “do not discuss your salary” is not a *dependent* clause (as the Board erroneously says). It is an imperative sentence and an *independent* clause. The Board seemingly knows what an “imperative” sentence is, as it uses the term elsewhere in its brief. *See* Resp. Br. 23.

The decisions in *Heck's* and *Radisson Plaza* involved far more than words like “ask” or “request,” and the underlying subject matter was compensation—heartland Section 7. The decisions are not comparable, and Boeing stands by its analysis of those cases in its opening brief. The Court can read them and see for itself which party is misrepresenting, or at least misapplying, them.

III. Boeing’s revised policy is not a blanket prohibition, and it is sufficiently supported by legitimate business justifications.

The Board’s textual analysis is not reasonably defensible, and the evidence in this case provides no support for the Board’s speculative theory that Boeing’s revised policy would reasonably be construed as prohibiting or tending to coerce employees from exercising Section 7 rights. This Court should grant Boeing’s petition and deny the Board’s application for cross-enforcement on that basis.

But if this Court concludes that the revised policy has some tendency to coerce, then it should hold that Boeing’s legitimate and substantial business justifications support the *recommendation* of confidentiality in Boeing’s revised policy. Whatever the quantum of business justification required for a blanket prohibition on discussing HR investigations coupled with a threat of discipline, a lower threshold applies here because Boeing’s policy—even if the Court were to find it had some tendency to be coercive—is plainly not a blanket prohibition.

A. Boeing preserved its business-justification argument.

The Board asserts that this Court lacks jurisdiction to consider Boeing's business justifications because they were not expressly stated in Boeing's exceptions. Resp. Br. 11, 34-35. The Board's hyper-technical argument is not supported by Section 10(e), the Board's own rules, or the relevant case law. Indeed, given the basis for the ALJ's decision, Boeing presented the business justification argument to the Board in precisely the way the Board's own rules contemplate. In any event, the Board's "jurisdictional" argument fails because the Board had ample notice and actually considered Boeing's business-justification defense.

"In assessing forfeiture under section 10(e) of the Act, 'the critical question' is 'whether the Board received adequate notice of the basis for the objection.'" *Camelot Terrace, Inc. v. NLRB*, 824 F.3d 1085, 1090 (D.C. Cir. 2016) (quoting *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 143 (D.C. Cir. 1999)); see *BPH & Co. v. NLRB*, 333 F.3d 213, 220 (D.C. Cir. 2003) (noting that petitioner "adequately apprised the Board of its insufficiency-of-evidence argument" for purposes of Section 10(e) when "[t]he Board in fact acknowledged the [petitioner's] insufficiency argument"). For that reason, courts "have not required that the ground for the exception be stated explicitly in the written exceptions filed with the Board," and look instead at whether "the ground for the exception [is] evident by the context in which [the exception] is raised." *Camelot Terrace*, 824 F.3d at 1090 (citations and

internal quotation marks omitted; second alteration in original). Statements in a petitioner's brief in support of its exceptions can supply that context, especially "an express statement . . . in one of the brief's headings." *Id.* at 1091.

The preservation issue here is not close. In front of the ALJ, Boeing noted its disagreement with the Board's case-by-case approach, explained the business interests supporting confidentiality during HR investigations, and noted the impracticality of the Board's case-by-case approach. E.R. 9. The ALJ did not reject Boeing's business justifications. Instead, the ALJ conceded that those justifications were "not without factual or legal support," but concluded that "it makes no difference at this stage how persuasive arguments for revisiting *Hyundai* may or may not be" because the ALJ was "bound to follow Board precedent." *Id.* at 9-10.

Board rules authorize briefs in support of objections. 29 C.F.R. § 102.46(a). Because Boeing employed this approach, it could not include any argument in the exceptions themselves. *Id.* § 102.46(b)(1)(iv). When, as in this case, a party files a separate brief, "[t]he best practice is to identify in the exceptions by section, page, or paragraph the portion of the administrative law judge's decision to which exception is taken, and to use the brief to set forth the basis for the exceptions." ABA Section of Labor & Employment Law, *How to Take a Case Before the NLRB* 548 (Brent Garren et al., eds., BNA Books 7th ed. 2000). Boeing did precisely that.

Boeing did not, of course, except from the ALJ's acknowledgement that Boeing's business justifications were not without factual or legal support, but it did take exception to each of the ALJ's findings and conclusions related to the validity of its business justifications. S.E.R. 38-39. Boeing's brief then laid out its argument in support of those exceptions, including an entire section (with a descriptive heading) devoted to the business justifications underlying Boeing's confidentiality policy for workplace investigations. *Id.* at 51-53.

The Board raised no question about that approach in its decision below. Indeed, it treated the exception as properly presented: "The Respondent excepts, arguing that requiring confidentiality in all of its investigations was lawful based on legitimate business justifications." E.R. 2. The Board then analyzed Boeing's business-justification arguments, concluding that Boeing "has not demonstrated the existence of a legitimate and substantial business justification" for the revised policy, and that Boeing "made no [case-by-case] assessment, sweeping all investigations under its revised policy." *Id.* at 4. The dissenting Board member also discussed the practical problems with requiring an employer to articulate business justifications for confidentiality during "*the preliminary stages* of any investigation where an employer will likely have *little to no knowledge of the underlying facts.*" *Id.* at 5 n.2 (emphasis in original).

Given that Boeing's business-justification defense was both forcefully "urged before the Board," 29 U.S.C. § 160(e), and actually considered by the Board, there is no basis for the Board's contention that Section 10(e) precludes its consideration by the Court.

B. Boeing's substantial business justifications and right to speak in favor of confidentiality outweigh any speculative impact on Section 7 rights.

Boeing's revised notice cannot reasonably be construed as a "blanket prohibition." Resp. Br. 11. As discussed in Boeing's opening brief (Pet. Br. 34-35), it is not reasonable for the Board to expand its new case-by-case approach to require an individualized assessment of an HR investigation before an employer can even *recommend* confidentiality. There are compelling business justifications for the revised notice, including the desire for broad protection of witnesses from retaliation and broad encouragement of complainants and witnesses to come forward. *See id.* at 28-32. The Board's new case-by-case approach is impractical and reflects a lack of understanding of how HR investigations work on the ground. *See id.* at 33-34.

The Board does not dispute that legitimate business interests are involved. *See* Resp. Br. 36 ("To be sure, the Board recognizes that employers have a 'legitimate need for confidentiality in certain circumstances to protect the integrity of their workplace investigations.'" (quoting *Banner Health II*, slip op. at 4)); *id.* at 40 ("[T]he Board recognizes that compliance with other laws can be a legitimate

business justification for requesting confidentiality.”); *id.* at 33 (“[T]he revised notice’s statement that discussing an investigation ‘could impede the investigation and/or divulge confidential information to other employees’ (ER 25) could arguably be protected opinion on its own[.]”). The Board insists that those interests may be furthered only when it is shown at the outset of an investigation that they are being threatened. But if Boeing’s revised notice is properly construed as a recommendation, then its substantial business justifications for making that recommendation ought to be sufficient to outweigh any speculative impact on Section 7 rights.

The Board does not appreciate that having a workable confidentiality policy is also a legitimate business interest that overlays each of the interests the Board recognizes. The Board counter-intuitively claims that its “individualized” approach actually gives employers “flexibility to request confidentiality when their interests truly require it, while preserving employees’ Section 7 rights the rest of the time.” Resp. Br. 37. But Boeing is not seeking to *require* confidentiality on threat of discipline in certain types of cases or when certain showings are made. Rather, Boeing believes it is preferable to state the general benefit of confidentiality and recommend it, while mandating a strong anti-retaliation policy. The Board is rigidly and inflexibly rejecting a sound, flexible compromise that the weighing of legitimate employee and business interests ought to permit.

There is a glaring asymmetry in the Board's analysis. The Board demands an individualized showing by employers in each case even to recommend confidentiality, but it requires no showing at all that Section 7 rights are actually chilled by a recommendation of confidentiality. Perhaps the worst example of the Board's heads-I-win/tails-you-lose approach is that the Board finds a threat of employer retaliation evident in a notice that expressly emphasizes Boeing's anti-retaliation policy. The revised notice threatens nothing, it has resulted in no discipline, and there is no evidence that it has ever chilled the exercise of Section 7 rights.

The Board's approach also impairs Boeing's right to free speech. The Board would negate Boeing's right to speak in favor of confidentiality based on an entirely speculative assertion of infringement upon Section 7 rights. The free speech issue is important, and the Board's analysis is wrong.

This Court may consider Boeing's free speech claims because the Board considered the applicability of 29 U.S.C. § 158(c) to the revised notice *sua sponte*, and it would have been futile for Boeing to have sought reconsideration. As a general matter, the NLRA "requires [a] party to raise its challenges itself" and a "party may not rely on arguments raised in a dissent or on a discussion of the relevant issues by the majority to overcome the § 10(e) bar." *HTH Corp. v. NLRB*, 823 F.3d 668, 673 (D.C. Cir. 2016). Thus, generally, a party must file a motion for reconsideration of the Board's *sua sponte* action to preserve that issue for review. *Id.* On

the other hand, as the D.C. Circuit explained, when the Board acts *sua sponte*, the “patent futility of a reconsideration motion excuses [a party’s] failure to object.” *Id.* at 674. In other words, when “asking the Board to reconsider its *sua sponte* decision . . . would have been patently futile,” a party’s “failure to do so is excused under § 10(e)’s ‘extraordinary circumstances’ exception.” *Id.*

Here, the Board majority and the dissenting Board member did more than raise or discuss the impact of 29 U.S.C. § 158(c) on Boeing’s revised policy. They argued both sides of the issue and the Board majority expressly decided it. *Compare* E.R. 4 (“Section 8(c) cannot ever be relied on to adopt rules that would reasonably tend to interfere with the exercise of employees’ Section 7 rights.”), *with* E.R. 7 (“As I don’t believe a recommendation is a threat in disguise, I fault my colleagues for essentially reading Section 8(c) out of the statute when it comes to Section 8(a)(1).”). The divergence between the Board majority and the dissenting Board member was clear, and any motion for reconsideration would have been futile. This Court should reach the issue, especially considering that the revised policy contains only a recommendation.

The Board has unfairly marginalized Boeing’s free speech rights under Section 8(c). *See* Pet. Br. 35-37. Boeing has a “firmly established” free speech right to express its opinions to its employees. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). “Section 8(c) of the Act specifically prohibits [the Board] from finding

that an uncoercive speech, whenever delivered by the employer, constitutes an unfair labor practice.” *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 515 F.3d 942, 946 (9th Cir. 2008) (quoting *Livingston Shirt Corp.*, 107 N.L.R.B. 400, 405 (1953)). As expressly provided in the statute, employer “speech is privileged if it contains no threat or promise.” *UAW v. NLRB*, 834 F.2d 816, 820 (9th Cir. 1987).

The Board offers no evidence to support its conclusion that the revised notice—which emphasizes Boeing’s anti-retaliation policy—would reasonably be construed as carrying “potential for retaliation.” Resp. Br. 32-33; *see* E.R. 4. Nor does it explain why Boeing’s opinion “falls outside the ambit of Section 8(c)” simply because it is contained in the revised notice. Resp. Br. 33. While cases discussing Section 8(c) primarily confront an employer’s right to express opinions about the merits of unionization, nothing in the statute cabins an employer’s free speech rights to that topic. Any reasonable consideration of Boeing’s legitimate interests and free speech rights should have sustained Boeing’s mere recommendation of confidentiality.

IV. The Board’s nationwide posting requirement serves no remedial purpose.

Boeing’s revised policy is lawful, and no posting remedy is warranted. There is no record evidence of any impact on employees’ Section 7 rights, and the Board’s nationwide posting remedy serves no remedial purpose. *See* Pet. Br. 38-40. Moreover, no posting remedy is necessary when considering the circumstances

of this dispute: Boeing witnesses and complainants will continue to receive notice of their rights at the outset of HR investigations through the revised Notice of Confidentiality and Prohibition Against Retaliation.

With respect to the old notice, there is little question that the Board's posting remedy is not properly remedial. *See* Pet. Br. 40-41. The old notice has not been in use for four years, the unequivocal rescission of Ms. Gamble's written warning was finalized even earlier, and the only entity that refuses to accept those undisputed facts is the Board. Resp. Br. 50 n.27. The Board clearly abuses its discretion in seeking an anachronistic posting remedy regarding an obsolete policy that was never publicized and that no longer exists.

CONCLUSION

The Board's interpretation of Boeing's revised policy is not reasonable. Boeing's petition for review should be granted and enforcement of the Board's order should be denied.

Respectfully submitted.

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